STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket Nos. 7678 and 7679

Petition of Beaver Wood Energy Pownal, LLC, for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, to install and operate a Biomass Energy Facility and an integrated wood pellet manufacturing facility located north of the old Green Mountain Racetrack in Pownal, Vermont, to be known as the "Pownal Biomass Project"	)

and

Petition of Beaver Wood Energy Fair Haven, LLC, for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, to install and operate a Biomass Energy Facility and an integrated wood pellet manufacturing facility located north of Route 4 in Fair Haven, Vermont, to be known as the "Fair Haven Biomass Project"	)

Order entered: 4/1/2011

ORDER RE: JURISDICTION OVER WOOD-PELLET MANUFACTURING FACILITIES

Introduction

The Petitioners in these two dockets, Beaver Wood Energy Pownal, LLC ("BWE - Pownal") and Beaver Wood Energy Fair Haven, LLC ("BWE - Fair Haven") (collectively "BWE"), have sought Public Service Board ("Board") approval, pursuant to 30 V.S.A. § 248, for construction of (a) a biomass energy facility and wood-pellet manufacturing facility in Pownal, Vermont (the subject of Docket No. 7678), and (b) a biomass energy facility and wood-pellet manufacturing facility in Fair Haven, Vermont (the subject of Docket No. 7679). BWE

contends that the Board has jurisdiction to approve the wood-pellet manufacturing facilities under 30 V.S.A. § 248. Other parties dispute the Board's jurisdiction over the wood-pellet manufacturing facilities.

The resolution of this jurisdictional issue will likely have considerable significance not only for the future course of these dockets, but also for BWE's efforts to obtain the permits necessary for its proposed projects, because if the wood-pellet facilities fall within the scope of Section 248, then they would be exempt from requiring Act 250 approval and local zoning approval.[1] Therefore, the Board has decided that the issue should be addressed by the Board directly, rather than by the Hearing Officers. A Board determination at this stage of the proceedings will allow an earlier resolution of the jurisdictional issue than if the Hearing Officers were to issue a jurisdictional opinion.

In today's Order, the Board concludes that it lacks Section 248 jurisdiction over the wood-pellet facilities.

Background and Procedural History

On October 27, 2010, BWE-Pownal filed a petition, pursuant to 30 V.S.A. § 248, to construct and operate a biomass energy facility and wood-pellet manufacturing facility to be located in Pownal, Vermont. On the same date, BWE-Pownal filed a Motion for Preliminary Approval, which requests that the Board authorize BWE-Pownal to begin some construction activities in December of 2010.

On November 3, 2010, BWE-Fair Haven filed a petition to construct similar facilities to be located in Fair Haven, Vermont. The November 3 petition also included a Motion for Preliminary Approval requesting that the Board allow BWE-Fair Haven to begin some construction activities in December of 2010.

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1. Under 10 V.S.A. § 6001(3)(D)(ii), "the construction of improvements for an electric generation or transmission facility that requires a certificate of public good under 30 V.S.A. § 248" is excluded from the definition of "development" and thus does not require a permit under 10 V.S.A. § 6001(3). Under 24 V.S.A. § 4413(b), a municipal zoning bylaw cannot regulate generation and transmission facilities that fall under Section 248 jurisdiction.

On December 9, 2010, the Board issued an Order denying BWE's motions for preliminary construction approval.

On January 14, 2011, BWE filed a Memorandum of Law Related to Initial Jurisdictional Issue. On February 7, 2011, the Department of Public Service ("Department") filed comments on the jurisdictional issue. Also on February 7, the Town of Williamstown, Massachusetts ("Williamstown"), and Southern Vermont Citizens for Environmental Conservation & Sustainable Energy, Inc. ("SVC") together filed a Joint Opposition to Petitioner's Request to Assert Jurisdiction Over Pellet Manufacturing Plant. On February 16, 2011, BWE filed a Reply Brief.[2]

Positions of the Parties

BWE contends that the electric generation and wood-pellet manufacturing aspects of its projects "are so closely integrated that conducting separate Section 248 and Act 250 proceedings would be not only impractical, inefficient, and inconsistent with legislative intent, but also contrary to Board and court precedent and state policy."[3]

BWE asserts that while the courts have not addressed Section 248 jurisdiction over a commercial development that is "fully integrated" with an electrical generation facility, the Vermont Attorney General has issued an opinion that guides resolution of the jurisdictional issue in these dockets. In 1971, the Attorney General issued an opinion concluding that the exemption from Act 250 jurisdiction for "electric generation facilities" includes a proposed improvement that "bears a reasonable relationship and can be considered to be a part of an electric transmission or generation facility, having in mind the broad meaning to be ascribed to the word 'facility.'"[4] BWE contends that Board precedent has followed the 1971 Attorney General opinion, citing specifically the Board's determination in *In re: UPC Wind Management, LLC*, Docket No. 6884,

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2. In addition to the legal briefs submitted by parties, the Board received a number of public comments addressing the jurisdictional issue, including comments from the State of Vermont Natural Resources Board. The Natural Resources Board includes a Land Use Panel, whose authority includes management and enforcement of the Act 250 process. 10 V.S.A. § 6027(g).

3. BWE Memorandum of Law at 1–2.

4. *Attorney General Opinion,* 1972 Op. Atty. Gen. Vt. 167, 1 (Aug. 5, 1971).

Order of April 21, 2004 ("*UPC*"), and a Hearing Officer decision in *Petition of Meridian Group, Inc.*, Docket No. 4813-B, Order of February 4, 1993 ("*Meridian Group*").

BWE next asserts that its proposed wood-pellet manufacturing facilities are reasonably related to, and are a part of, its proposed electrical generation facilities. According to BWE, it has included the wood-pellet facilities in the projects primarily in order to increase the overall energy efficiency of the projects, such that the overall efficiency is increased by approximately fifteen percent. BWE acknowledges that the electric generation facilities could be constructed without the accompanying wood-pellet facilities, but the consequence would be much less efficient power plants with correspondingly more expensive power. BWE further contends that the wood-pellet and electric generation facilities are engineered to function as one unit, with the wood-pellet facility using waste heat and steam from the electrical unit, and the electrical unit using waste (i.e., bark) from the wood-pellet facility as fuel. BWE asserts that it has no interest in developing a wood-pellet facility other than as an integral part of the electric generation facility, and that therefore the wood-pellet facility's "relationship to the electrical facility is the sole reason for its existence."[5]

BWE contends that it would be difficult to review separately the environmental impacts of the electric generation facility and the wood-pellet facility. BWE notes that at each of its two proposed projects the power plant and the wood-pellet facility will be located on the same lot, will share many infrastructure components (such as interior roads, water supplies, and parking), will share certain employees, and will have identical management. BWE represents that every permitting authority in Vermont that has reviewed the projects has treated the electric generation and wood-pellet manufacturing as a fully integrated project, such that each authority would issue a single permit for the overall project.

BWE maintains that the State of Vermont has a long-standing policy of "one-stop-shopping" with respect to land-use permits, a policy that, according to BWE, has been recognized by the Environmental Court in its *Glebe Mountain* decision,[6] by the Board in its *UPC Wind* and

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5. BWE Memorandum of Law at 6.

6. *Glebe Mountain Wind Energy, LLC*, Docket #234-11-05 Vtec, Revised Decision on Cross-Motions for Summary Judgment, at 8 (Aug. 3, 2006).

EMDC proceedings,[7] by legislative testimony of former Board Chairman Richard Cowart, and by the legislature in enacting 10 V.S.A. § 8506 (which provides for the Board to hear appeals of environmental permits related to renewable energy facilities).

BWE asserts that if the Board does not claim jurisdiction over the wood-pellet manufacturing facilities, the result will be redundant review of environmental impacts and a duplicative permitting process. BWE contends that in light of the degree of shared improvements between the power plant and the wood-pellet facility, it is not possible for the Board to limit its review of environmental impacts to solely those associated with the electrical generation facility, nor for the Act 250 District Commission to limit its review solely to those impacts that would result from the wood-pellet manufacturing facility. BWE also maintains that separate reviews run the risk of failing to address the full impacts of the overall project.

BWE claims that the Board's review of environmental impacts under Section 248 is sufficiently broad that requiring Act 250 approval would be duplicative and would not provide any meaningful additional environmental review. BWE contends that separate reviews would be redundant which, according to BWE, conflicts with the goal of judicial efficiency, is inconsistent with the doctrine of claim preclusion, might lead to contradictory results, and would discourage the development of innovative renewable energy facilities in Vermont.

BWE asserts that the Board should interpret its jurisdictional grant under Section 248 in a manner that promotes the legislature's intent which, according to BWE, is to promote the development of renewable energy.

BWE maintains that absurd results would ensue if the wood-pellet facilities were separated out for review under Act 250, rather than included in an integrated review under Section 248. According to BWE, a segregated review would make permit enforcement "virtually impossible" because of the difficulty in assigning activities or impacts to either the electrical generation facility or the wood-pellet facility. BWE also contends that if a Board decision on the aesthetic impacts of the electrical facility and an Act 250 decision on the aesthetics of the wood-pellet facility reached opposite conclusions and both decisions were before the Vermont Supreme

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7. *UPC,* Docket No. 6884, Order of 4/21/04; *Petition of EMDC, LLC,* Docket No. 7037, Order of 7/29/05.

Court on appeal, the Court "would be faced with an impossible dilemma."[8] The dilemma, BWE posits, would be that the Court could not defer to the conflicting decisions and might either affirm contrary findings, or be forced to reach its own decision based on its own independent review of the record.

BWE maintains that even if the Board concludes that it lacks jurisdiction over any part of the proposed projects, the doctrine of concurrent jurisdiction dictates that the Board should exercise exclusive jurisdiction over the integrated facilities, because the Board is the first tribunal to have acquired jurisdiction.

Williamstown and SVC contend that BWE's wood-pellet manufacturing facilities do not fall within the Board's Section 248 jurisdiction. According to Williamstown and SVC, "[t]he pellet plant provides a customer/user for the generating plant's thermal energy but has no relationship to output of the electric generating plant. They are separate, stand alone businesses."[9] Williamstown and SVC assert that because the term "electric generation facility" in Section 248 is not defined in a statute or Board rule, it must be interpreted according to its plain meaning. Williamstown and SVC claim that to adopt BWE's position would define the term "electric generation facility" so broadly as to render it meaningless.

To support their argument, Williamstown and SVC note that the Board has not asserted Section 248 jurisdiction over facilities that use steam from biomass plants, or mills or other businesses that receive electricity from an adjacent hydroelectric generation facility, or a manufacturing plant that is directly interconnected with a gas pipeline. Williamstown and SVC also point to Board precedent from Docket No. 7201, in which the Board determined (on reconsideration) that a distribution-line upgrade necessitated by a proposed electric generation facility was not itself part of the facility that required approval under Section 248.

Williamstown and SVC assert that, as a body of limited jurisdiction, the Board cannot usurp Act 250 and local zoning jurisdiction over a private manufacturing facility. Williamstown and SVC further maintain that the policy of one-stop shopping advanced by BWE cannot overcome the statutory limitations on the Board's jurisdiction.

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8. BWE Memorandum of Law at 17.
9. Williamstown and SVC Joint Opposition at 6 (footnote omitted).

Williamstown and BWE dispute BWE's application of the 1971 Attorney General's opinion to the present circumstances. Williamstown and BWE assert that the Attorney General's opinion stands for the reasonable proposition that site improvements that are reasonably related to an electric generation facility, such as roads, fall within the reach of Section 248.

Williamstown and SVC claim that, contrary to BWE's position, review of the electric generation facility under Section 248 and of the wood-pellet facility under Act 250 and local zoning would be neither redundant nor ineffective.

The Department asserts that the statutory language of Section 248 and Act 250 does not, by itself, indicate whether BWE's proposed projects are exempt from Act 250 review. Nor does the Department find that the 1971 Attorney General's Opinion definitively answers the question, noting that the "reasonably related" standard is so broad that parties on both sides of the present jurisdictional issue purport to find support in that standard. The Department further contends that Board and Environmental Court precedent are not sufficiently on point to guide resolution of the jurisdictional question presented by BWE's proposed projects. The Department concludes that, while synergistic projects such as the ones proposed by BWE may be laudable, current law does not bring the entirety of the projects under Section 248 jurisdiction.

Discussion

The question before the Board is whether BWE's two proposed wood-pellet manufacturing facilities are properly considered part of its two proposed electric generation facilities for purposes of the Board's jurisdiction under Section 248. An electric generation facility that requires a certificate of public good under Section 248 is exempt from Act 250 and from local zoning.[10] Thus, whether BWE's proposed wood-pellet manufacturing facilities are considered electric generation facilities under Section 248 has significant implications for whether BWE will need other regulatory approvals.

It has long been established that the Board is a body of limited jurisdiction. As described by the Vermont Supreme Court in the seminal *Trybulski* case:

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10. 10 V.S.A. § 6001(3)(D)(ii); 24 V.S.A. § 4413(b).

> The Public Service [Board] is an administrative body, clothed in some respects with quasi judicial functions, authorized in the exercise of the police power to make rules and regulations required by the public safety and convenience and to determine facts upon which existing laws shall operate, and having, in a sense, auxiliary or subordinate legislative powers which have been delegated to it by the General Assembly. It is a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction. It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation.[11]

Thus, to exercise jurisdiction over the wood-pellet facilities the Board would need to conclude either that the legislature has expressly given it such jurisdiction, or that such jurisdiction is necessarily implied in order to exercise fully the Board's express authority, being mindful of the Supreme Court's admonition that "nothing will be presumed in favor of [the Board's] jurisdiction."

In determining whether review of BWE's proposed wood-pellet manufacturing facilities falls within the Board's jurisdiction under Section 248, the goal is to ascertain the legislature's intent,[12] and to do that we begin with the statutory language.[13] Section 248(a)(2) provides that:

> Except for the replacement of existing facilities with equivalent facilities in the usual course of business, and except for electric generation facilities that are operated solely for on-site electricity consumption by the owner of those facilities . . . no company, as defined in section 201 of this title, and no person, as defined in subdivision 6001(14) of Title 10, may in any way begin site preparation for or commence construction of an electric generation facility or electric transmission facility within the state which is designed for immediate or eventual operation at any voltage . . . unless the public service board first finds that the same will promote the general good of the state and issues a certificate to that effect.

The legislature has not provided a definition of "electric generation facility" with respect to Section 248, nor do the Board's Rules define the term. Clearly, a wood-pellet manufacturing facility is not, by itself, an electric generation facility. The question before this Board is whether,

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11. *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941)(citations omitted).

12. *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 8 (citing *Delta Psi Fraternity v. City of Burlington*, 2008 VT 129, ¶ 7).

13. *Id.* (citing *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 14).

under the circumstances presented by BWE's petitions, their proposed wood-pellet facilities should be considered part of their electric generation facilities.

Shortly after both Section 248 and Act 250 were enacted, the Vermont Attorney General issued an opinion addressing the issue of what project components should be included as part of an electric generation facility subject to Section 248 jurisdiction, and thus not subject to Act 250 jurisdiction. The Attorney General concluded:

> where a proposed improvement *bears a reasonable relationship and can be considered to be part of an electric transmission or generation facility, having in mind the broad meaning to be ascribed to the word 'facility,'* it is my opinion the exemption applies and no Act 250 permit can be required prior to construction.[14]

By way of example, the Attorney General's opinion states that "a separate Act No. 250 permit is not required for the construction of impoundments, roads, rail spurs and lagoons in connection with electric generation and transmission facilities."[15] The Attorney General further opines that the substantial overlap between Act 250 review and Section 248 review indicates that the Vermont legislature sought to avoid redundant oversight by exempting transmission and electric generation facilities from Act 250 jurisdiction.

This Board has followed the Attorney General's guidance and applied the "reasonable relationship" standard in determining whether a site improvement is part of an electric facility subject to Section 248 jurisdiction.[16] However, as the Department correctly observes, the "reasonably related to" language is sufficiently vague that it can arguably support both sides of the issue before us. Therefore, it is important to recognize that the standard does not simply ask whether the site improvement in question is reasonably related to the generation facility. It also requires, in the words of the Attorney General, that the improvement "can be considered to be part of an electric generation or transmission facility," recognizing the broad meaning of "facility."

Board precedent is instructive. Although the Board has not previously explicitly ruled on the scope of its Section 248 jurisdiction under the circumstances presented by BWE's proposed

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14. Op. Vt. Att'y Gen., No. 715 (Aug. 5, 1971) at 172 (emphasis added).
15. *Id.* at 171.
16. *E.g., UPC* at 17–18.

projects – a manufacturing operation located on the same site as the power plant, sharing site improvements with the generator, providing fuel to the generator in the form of the manufacturing operation's own waste product, and itself using a waste product (heat) from the generator– these circumstances are analogous to those presented in Board Docket Nos. 7154 and 7570, and in a typical farm-methane electric generation project.

In Docket No. 7154, Vermont Electric Cooperative, Inc. ("VEC"), Ethan Allen Operations, Inc. ("Ethan Allen"), and Northern Community Investment Corporation ("NCIC") jointly petitioned the Board for a Section 248 CPG for construction of an electric generation facility and related equipment at the Ethan Allen furniture manufacturing facility in Beecher Falls, Vermont. At the time of the joint petition, Ethan Allen operated two boilers, fueled by waste wood, to produce steam to provide process heat used in its wood-drying kilns. Ethan Allen's wood-drying process required a reduction in pressure of the steam exiting the boilers. At the time, Ethan Allen used a seventy-year-old single-piston, reciprocating-engine-driven generator to reduce the pressure of the steam from the boilers while at the same time generating electricity. The joint petitioners proposed replacing the old generator with a new one to be owned by NCIC and leased to VEC. The new generator would continue to serve the dual functions of reducing the pressure of process steam and generating electricity, with the size of the new generator dictated by Ethan Allen's process-steam requirements. VEC would pay operating and maintenance expenses, taxes, and insurance on the generator, and would be entitled to its entire electrical output.[17]

Under the circumstances presented in Docket No. 7154, the Board exercised Section 248 jurisdiction over the new electric generator. However, the Board did not claim jurisdiction over the Ethan Allen furniture manufacturing facility with which the generator was integrated, even though the furniture facility shared the project site with the generator, the generator was fueled by waste wood from the furniture operations, the generator provided an essential non-electrical service to the furniture manufacturing facility by reducing process-steam pressure, and the generator's size was dictated by the process-steam requirements of the furniture manufacturing facility. Thus, even though the electric generator under review in Docket No. 7154 was more

17. *Petition of VEC, Ethan Allen and NCIC*, Docket No. 7154. Order of 5/12/06 at 3–5.

fully integrated with Ethan Allen's furniture manufacturing process than BWE's generators will be with BWE's wood-pellet manufacturing process, the Board did not take jurisdiction over the Ethan Allen manufacturing facilities.[18]

In Docket No. 7570, PurposeEnergy, Inc. ("PurposeEnergy") sought a Section 248 CPG for the construction, installation and operation of a cogeneration facility at the Magic Hat brewery in South Burlington, Vermont. PurposeEnergy's proposed project would use an anaerobic digestion process to convert solid and liquid byproducts of the brewing process to biogas and electricity. A portion of the biogas would be used by the brewery as a substitute for natural gas used in the brewing process, with the remaining biogas used to fire a 330 kW cogeneration unit to produce electricity and heat. The heat, in turn, would be used to preheat the water supply to the brewery. The anaerobic digester would also function as a wastewater pretreatment system for the brewery.[19]

In Docket No. 7570, as in Docket No. 7154, the Board exercised Section 248 jurisdiction over the electric generation facility without asserting broader jurisdiction over the associated commercial enterprise where the generator not only was located but also with which it was closely integrated.

A typical farm-methane project is located on the same site as farming operations, the farming operations and electric generation share the use of site improvements (e.g., manure storage lagoons, methane digesters, internal roads), the farming operations provide fuel to the generator in the form of farming wastes (manure and waste crops, used to produce methane for the generator), and the farming operations use waste products from the methane production (solids for bedding and liquids for fertilizer). Indeed, as with the Ethan Allen project reviewed in Docket No. 7154, farm-methane electric generation projects are typically more integrated with the farming operations than BWE's electric generation would be with the wood-pellet operation. Farm waste products typically provide a majority of the feedstock for the methane digester,

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18. If Section 248 jurisdiction had attached, obviously no Section 248 CPG would have been required for the construction of the pre-existing Ethan Allen furniture manufacturing facilities. However, had those facilities in fact become part of the electric generation facility and subject to Section 248 jurisdiction, then any substantial change to the furniture manufacturing facilities would presumably require an amendment to the Docket No. 7154 CPG, in accordance with Board Rule 5.408.

19. *Petition of PurposeEnergy, Inc.*, Docket No. 7570, Order of 12/31/09.

whereas with BWE's projects, waste from the wood-pellet facility would provide only a small portion of the electric generator's fuel.[20] As such, a typical farm-methane electric generator could not operate without the farming waste products, whereas BWE's generators could operate without the wood-pellet-derived waste.[21]

The Board has never asserted jurisdiction generally over farming facilities in reviewing farm-methane projects. If the Board were to accept BWE's argument that Section 248 jurisdiction extends to BWE's proposed wood-pellet facilities, by that logic the Board would need to assert jurisdiction over farming facilities when it reviews farm-methane generation projects.[22]

BWE's projects as proposed are what are typically referred to as "combined heat and power" ("CHP") projects, which produce both electric power and heat, and as such it is unremarkable that BWE's projects include a non-electric-generation use for the heat. The legislature recognized the existence of CHP facilities when it established Vermont's Sustainably Priced Energy Enterprise Development ("SPEED") program, including provisions to allow fossil-fuel-based CHP to be recognized as "nonqualifying SPEED resources."[23] Although the legislature expressly acknowledged the development of CHP projects by including them in the SPEED program, and recognized that CHP projects produce thermal energy as an essential feature, the legislature did not include any provisions for Board jurisdiction over the facilities that would make use of the CHP project's thermal output.

Any CHP project will require a host or other use for the heat that the project produces, as at the Magic Hat brewery in the case of the PurposeEnergy project reviewed in Docket No. 7570.

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20. According to prefiled testimony submitted by BWE in support of its petition, the electric generator is projected to consume approximately 350,000 green tons of wood fuel annually. Of that, approximately 26,000 green tons is expected to be provided by bark and other residue from the wood-pellet production. Kingsley pf. (Docket No. 7478) at 2–3.

21. Affidavit of William Bosquet at 2.

22. Although farming operations are exempt from Act 250 (10 V.S.A. § 6001(3)(D)(i)), there is no comparable exemption from Section 248 review, if the farming operations in fact were to fall within Section 248's scope. Presumably, the legislature did not perceive a need to include a farming exemption from Section 248 because it did not intend Section 248 review to extend to the farming operations themselves, despite an explicit legislative acknowledgment (and encouragement) of farm methane electrical generation projects that are subject to Section 248 review.

23. 30 V.S.A. § 8002(6).

At other CHP projects the heat might, for example, be used on-site for an industrial process or space heating, or off-site for district heating. We cannot find any basis in the law or in common-sense usage of the English language to conclude that such use of a CHP project's heat output "bears a reasonable relationship and can be considered to be part of an electric . . . generation facility," even bearing in mind the broad meaning of "facility."

Similarly, the fact that co-locating the wood-pellet facility with the electric generation facility makes the overall use of the fuel more efficient does not make the pellet plant a part of the generation facility. Such synergistic sharing of inputs to the generation process, while potentially beneficial for society as well as for the financial interests of project developers, does not somehow convert the manufacturing process into an electric generation process. As Williamstown and SVC correctly note, BWE does not claim that the wood-pellet facility increases the efficiency of the process of converting wood fuel into electricity. Instead, BWE can only claim that the overall use of the wood fuel is made more efficient, through the use by the wood-pellet facility of excess heat from the electric generation process that otherwise would go to waste. In this way the fuel is used more efficiently and the economics of the overall project may be improved, but these factors do not support the Board's assertion of Section 248 jurisdiction over the wood-pellet facility.

The Board precedent cited by BWE does not point to a different result. In *UPC*, the Board concluded that three wind-measurement towers fell within the scope of Section 248 because they

> are needed to determine the economic feasibility of constructing a wind generating facility atop Hardscrabble Mountain, and if the project is feasible, the appropriate placement of individual turbines. Additionally, the only existing wind project in Vermont, at Searsburg, incorporates an existing wind measurement tower into the final project. Consequently, we conclude that UPC's proposed wind measurement towers, in preparation for a potential wind generating project on Hardscrabble Mountain, are not only reasonably related, but directly related, to a generating facility.[24]

The temporary wind-measurement towers at issue in the *UPC* case were precursors to, and essential for the construction of, the wind generating facility, and had no other purpose. BWE's

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24. *UPC* at 18 (footnotes omitted).

wood-pellet facilities are neither precursors to nor essential to BWE's electric generation facility, and would serve a non-electric-generation purpose, the commercial production of wood pellets for off-site use. For these reasons the Board's decision in *UPC* does not provide useful guidance for the jurisdictional issue before us.

Similarly unavailing is BWE's reliance on the Hearing Officer's Order of February 4, 1993, in the *Meridian Group* proceeding, in which the Hearing Officer concluded that the installation of trash-separation equipment fell within Section 248 jurisdiction. First, that was a ruling by the Hearing Officer, not one by the Board itself. Because the Board never issued a final order on the merits of the petition, the Hearing Officer's ruling was not adopted, either explicitly or implicitly, by the Board. Furthermore, even if it had been adopted by the Board, the Hearing Officer's ruling does not support BWE's position in the instant proceedings. The Hearing Officer expressly found that: "The incinerator, and therefore the generator, will not be able to run without the operation of the trash separation equipment. . . . Therefore, the generation facility that Meridian/VIWS has proposed to restart includes, as a key component, the trash separation equipment."[25] Here, BWE acknowledges that its wood-pellet facilities are not required for the generation facility. Thus, BWE's position fails to find support in the Hearing Officer's *Meridian Group* decision.

As noted earlier, the Vermont Supreme Court has held that the Board "has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted."[26] The Board has no express grant of authority over wood-pellet manufacturing facilities and, as explained above, the Board can fully review the impacts of the construction and operation of the proposed generation facilities under the criteria of Section 248 without also exercising jurisdiction over the wood-pellet facilities. Therefore, we find no basis to conclude that jurisdiction over the wood-pellet facilities is "necessary to the full exercise of" our authority over BWE's proposed electric generation facilities.

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25. Docket No. 4813-B, Order of 2/4/93, at 7.
26. *Trybulski* at 7.

BWE's remaining arguments can be readily addressed. First, even if there are state policies supporting "one-stop-shopping," the legislature has not amended Vermont statutes to create a single state land-use review – be it Section 248 or Act 250 – for a site that includes both grid-connected electric generation[27] and other commercial development. Furthermore, the fact that BWE has applied for approximately 20 permits for the Pownal project and 30 permits for the Fair Haven project[28] belies the claim that Vermont has adopted an overriding "one-stop-shopping" policy that would extend to all necessary permits.[29]

Second, requiring Section 248 review of BWE's electric generation facilities while BWE's wood-pellet manufacturing facilities are reviewed under Act 250 would not be redundant. The different reviews will be considering different facilities and will be applying different, statutorily mandated criteria. While there would be some overlap in the project components under review and in the issues addressed, there is nothing unusual in having multiple regulatory authorities reviewing the same facility, often reviewing the same types of impacts.[30] BWE itself notes that it requires on the order of twenty to thirty permits for each of its Projects. And, to the extent that there will be some overlap in review, unless the legislature determines that the overlap should be eliminated, BWE and the involved state agencies and towns must comply with the statutory provisions that call for the overlapping reviews.

Third, we do not accept BWE's suggestion that the statutory purpose of Section 248 is to promote renewable energy.[31] Although that is undoubtedly a principal goal of state energy policy[32] and of the legislature's establishment of the SPEED program, Section 248 is designed to

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27. We specify "grid-connected" because a Section 248 CPG is not required for "electrical generation facilities that are operated solely for on-site electricity consumption by the owner of those facilities." 30 V.S.A. § 248(a)(2).

28. Affidavit of William Bosquet at 2.

29. We also see no merit to BWE's reliance on legislative testimony by former Board Chairman Richard Cowart. Chairman Cowart was addressing the possibility of the same facility being subject to an Act 250 review of environmental impacts and a separate Section 248 review of non-environmental issues. His testimony did not address the issue presented here, namely, Act 250 and Section 248 each reviewing different components of a larger project.

30. For example, under Section 248 the Board has considered the wetland impacts of transmission lines for which wetland impacts also required approvals from the Agency of Natural Resources and the U.S. Army Corps of Engineers.

31. BWE Memorandum of Law at 19.

32. 30 V.S.A. § 8001.

ensure that the development of Vermont's energy infrastructure does not have undue environmental impacts (with due consideration of specific environmental criteria incorporated from Act 250), satisfies criteria related to need, reliability, and economic benefit, and overall promotes the general good of the state. While the promotion of renewable energy may be consistent with these requirements, and in fact furthers some of them, by itself it is not the primary purpose behind Section 248. The Board fully recognizes the state's goal of promoting renewable energy development, but the Board cannot exceed its statutory authority in seeking to advance that goal.

As for BWE's claim that the Board (and the Act 250 district commission) would be unable to assess the total impacts of the combined project if there were separate reviews of the electric generation facility and the wood-pellet facility, we see no reason that the Board and the commission could not take those overall impacts into account. To the contrary, this Board has conducted just such an analysis in the past. In Docket No. 7201, the Board ruled on a petition by VEC for a declaratory ruling that an upgrade to a distribution line required to interconnect a proposed electric generation facility is not subject to Section 248. The Board ultimately (on reconsideration) issued the requested ruling, concluding that "[t]he upgrade is part of the electric grid that is outside the control of the applicant and the upgrade, by itself, does not constitute a facility subject to Section 248."[33] Nonetheless, despite concluding that the distribution upgrade did not require approval under Section 248, the Board held that:

> because the distribution upgrade would be built only because of the proposed Berkshire project, the Board has a responsibility under Section 248(b) to ensure that the proposed Berkshire project, including the necessary distribution upgrade, would not have any undue adverse impacts. Consequently, the Board must receive testimony from VEC describing the upgrade and addressing any criteria under Section 248(b) on which the upgrade has the potential for significant impact.[34]

There also is no merit to BWE's contention that the Supreme Court "would be faced with an impossible dilemma" if presented on appeal with conflicting Section 248 and Act 250

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33. *In re: Petition of Vermont Electric Cooperative, Inc. for a Declaratory Ruling,* Docket No. 7201, Order of 9/15/06 at 1–2.

34. *Id.* at 2.

decisions. The Court is well able to apply the different legal requirements of each of the two regulatory schemes to the distinct records in each case, and issue correspondingly sound, separate opinions in the two cases.

BWE may be correct that enforcement issues could be more complex with separate Section 248 CPGs and Act 250 land use permits for the overall projects – for example, in distinguishing truck traffic associated with the different activities at the project. This again is not an issue unique to BWE's projects. As noted earlier, the Board has previously issued Section 248 CPGs to electric generation facilities located within an active manufacturing complex (the Ethan Allen plant in Beecher Falls) and within active farming operations.[35] Furthermore, even if separate reviews may present some challenges in enforcing certain permit conditions, such potential difficulties provide no basis to expand the limits on this Board's statutory jurisdiction and override Act 250 and local zoning authority.

Finally, BWE's reliance on the doctrine of concurrent jurisdiction is misplaced. Concurrent jurisdiction arises where two or more tribunals each have jurisdiction over the same subject matter.[36] Here, for the reasons stated above, Section 248 and Act 250 each have jurisdiction over different subject matters – i.e., the electric generation facility and the wood-pellet facility, respectively.

Conclusion

For the reasons set forth above, the Board lacks jurisdiction to approve BWE's proposed wood-pellet manufacturing facilities under 30 V.S.A. § 248.

BWE shall file a statement in each of these dockets by April 18, 2011, proposing how each docket should proceed in light of today's jurisdictional ruling.

These dockets are remanded to the Hearing Officers for further proceedings consistent with this Order.

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35. Section 248 CPGs issued for farm-methane generation projects typically include conditions restricting truck traffic bringing feedstock for the methane digesters. E.g., Docket No. 7592, *Petition of Monument Farms Three Gen LLC*, Order of 5/6/10 at 15.

36. BLACK'S LAW DICTIONARY 855 (7th ed. 1999).

SO ORDERED.

Dated at Montpelier, Vermont, this 1st day of April, 2011.

s/ James Volz)
)
) PUBLIC SERVICE
)
s/ David C. Coen) BOARD
)
) OF VERMONT
s/ John D. Burke)

OFFICE OF THE CLERK

FILED: April 1, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)